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No. 85-1187

In the Supreme Court of the United States

OCTOBER TERM, 1985

STEVE DISALVO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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TABLE OF AUTHORITIES

Page

Cases:

Harrington v. *California*, 395 U.S. 250 4

Schneble v. *Florida*, 405 U.S. 427 ..... 4, 6

United States v. *Inadi*, cert. granted, No. 84-1580 (May 28, 1985) 4, 6

Constitution, statutes, and rules:

U.S. Const. Amend. VI (Confrontation Clause) 4

18 U.S.C. 371 1

18 U.S.C. 1955 1

Fed. R. Evid. 801(d)(2)(E) 1

Sup. Ct. R. 20.1 1

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Petitioner contends that the Confrontation Clause bars the prosecution from introducing statements falling within the co-conspirator exception to the hearsay rule (Fed. R. Evid. 801(d)(2)(E)) unless it establishes that the declarant is unavailable to testify.

1. Following a jury trial in the United States District Court for the Eastern District of Wisconsin, petitioner was convicted of conspiring to operate a gambling business, in violation of 18 U.S.C. 371 (Count 1), and of a substantive gambling offense, in violation of 18 U.S.C. 1955 (Count 2). He was sentenced to consecutive terms of four years' imprisonment on each count. The court of appeals affirmed (Pet. App. A1-A67).[1]

[1]The judgment of the court of appeals was entered on November 12, 1985, and the petition for a writ of certiorari was not filed until January 13, 1986. The petition is therefore out of time under Rule 20.1 of the Rules of this Court.

a. The evidence at trial showed that petitioner supervised a sports bookmaking business that was owned by co-defendant Frank Balistrieri and managed on a day-to-day basis by co-defendant Sam Librizzi. Court-authorized electronic surveillance conducted at Librizzi's house between December 23 and December 26, 1977, showed that the business during those days alone accepted more than $30,000 in wagers (Tr. 1554).[2] The relevant incidents with respect to petitioner are set out below.

(1) During the 1976 football season, petitioner met with Librizzi on three successive days in a hospital parking lot. During one meeting, petitioner appeared to be angry with Librizzi. After another meeting, petitioner drove directly to Balistrieri's home. Tr. 262-267, 1211-1215, 1228-1230, 1238-1241, 1248-1252. In 1978, a federal grand jury conducted an investigation of the gambling operation, during which Balistrieri was shown photographs of one of these meetings (Tr. 1517). Later that day, Balistrieri told petitioner, " 'You got a problem,' "explaining, " 'Yes, they got pictures of you there where you picked up the money' "(Tr. 493). Balistrieri referred to Librizzi by name as the person with whom petitioner had met (Tr. 690-691).

(2) During the summer of 1978, petitioner, Balistrieri, and unindicted co-conspirator Benjamin Ruggiero met with two undercover FBI agents, whom Ruggiero attempted to recruit to work in Balistrieri's gambling operation (Tr. 476-492, 1004-1017). Petitioner told one of the agents at their restaurant meeting that he "handled [Balistrieri's] book, sports book," and that he wanted "to get out" (Tr. 479, 1012). Petitioner also said that he wanted "to charge the bookies a thousand dollars a week to operate," since they could not "go to the FBI for being extorted because it

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[2]Unless otherwise noted, "Tr." references are to the trial transcript.

was illegal in the first place" (*ibid.*). Petitioner then said that they had problems with their bookies, who were being "squealed on" by other bookies in town. Petitioner added that "all the bookies in town were stoolies" and that "it would take Castro's army to kill all the stoolies in Milwaukee" (Tr. 480, 1012). Balistrieri stated at the meeting that he wanted to find someone to replace Librizzi to oversee day-to-day operations, so that petitioner "wouldn't have to spend so much time taking care of the book" (Tr. 480, 1013). Ruggiero suggested to petitioner that one of the undercover agents be hired to "take the book" (Tr. 480-481, 1012-1013). Balistrieri then offered the job to the agent, who accepted (Tr. 494, 1013). Balistrieri instructed the agent to "[g]et together with [petitioner] and have a sit-down on it Tuesday" (*ibid.*). Petitioner and the agent agreed to meet the following Tuesday to discuss the process of the agent's "taking over the book" (Tr. 494).

b. During the trial, petitioner sought to exclude the tape-recorded out-of-court statements of co-conspirator Ruggiero. Petitioner contended that unless the government could show that Ruggiero was unavailable, the admission of these statements would violate his rights under the Confrontation Clause. The government noted that Ruggiero was currently incarcerated at Leavenworth, Kansas, and could be brought to Wisconsin if petitioner desired to call him. We also noted, however, that petitioner had not bothered to subpoena Ruggiero and had not sought a writ of habeas corpus ad testificandum to secure his presence. 9/26/83 Tr. 77-78. Without requiring proof of unavailability, the district court admitted Ruggiero's statements, finding that they were made by a co-conspirator during the course and in furtherance of the conspiracy (*id.* at 89-90).

c. The court of appeals affirmed (Pet. App. A1-A67). Relying on circuit precedent, the court held that the Confrontation Clause does not require proof of a co-conspirator's unavailability before his out-of-court statements can be admitted (*id.* at A56-A58).

2. The issue presented in this petition—whether the Confrontation Clause requires the government to demonstrate the unavailability of a co-conspirator declarant before his statement may be admitted into evidence—is now before the Court in *United States* v. *Inadi*, cert. granted, No. 84-1580 (May 28, 1985). While this case is an excellent illustration of what is so seriously wrong with the court of appeals' decision in *Inadi*,[3] there is no need to hold this petition pending disposition of *Inadi*. Even if Ruggiero's out-of-court statements were improperly admitted,[4] the error was harmless beyond a reasonable doubt. See *Schneble* v. *Florida*, 405 U.S. 427 (1972) (applying the test for harmless constitutional error to an alleged violation of the Confrontation Clause); *Harrington* v. *California*, 395 U.S. 250 (1969) (same).

Most of Ruggiero's statements incriminated petitioner's co-defendant Balistrieri. These statements concerned Balistrieri's hiring the undercover agents to work in his sports betting business, and on only one occasion did Ruggiero mention petitioner's name. After the restaurant meeting with petitioner and Balistrieri at which Balistrieri offered

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[3]As noted above (page 3), Ruggiero, the co-conspirator declarant, was incarcerated at a federal penitentiary in Kansas and was not desired as a witness by either party. Under such circumstances, it is hard to see what useful purpose would be served by compelling the government to transport a prisoner from Kansas to Wisconsin simply so that, though not desired as a witness, he could be "produced" in court.

[4]Petitioner does not challenge the admissibility of co-defendant Balistrieri's co-conspirator declarations.

one of the agents a job in his organization, Ruggiero and the agent left together in the same car, and Ruggiero gave the agent a pep talk on the money that he would earn if he accepted the position. Ruggiero told the agent that he would be working only with petitioner and one other person, and that Balistrieri had an appointment in Chicago on Tuesday and he did not know whether Balistrieri would take the agent or petitioner. GX T-202A, at 2-3.

In contrast to this fleeting reference to petitioner by Ruggiero, the most inculpatory evidence came from Balistrieri and petitioner himself. It was Balistrieri who provided the explanation for the photographs of petitioner's meetings with Librizzi in the hospital parking lot in 1976. After the photos were presented to the grand jury in 1978, Balistrieri told petitioner, " 'You got a problem,' " and explained, " 'Yes, they got pictures of you there where you picked up the money' "(Tr. 493). Likewise, it was Balistrieri who told the undercover agents that petitioner supervised the bookmaking operation, and that he (Balistrieri) wanted to hire someone so that petitioner "wouldn't have to spend so much time taking care of the book" (Tr. 480, 1013). And it was Balistrieri who instructed the agent to meet with petitioner to learn how to handle the job (Tr. 494, 1013).

Other incriminatory evidence came from petitioner's own lips. Petitioner told the agents that he "handled [Balistrieri's] book, sports book," and that he wanted "to get out" (Tr. 479, 1012). Petitioner also suggested extorting $1,000 from every bookie in Milwaukee (*ibid.*) and complained about all the stool pigeons in town (Tr. 480, 1012).

Thus, Ruggiero's out-of-court statements were not the damning evidence on which petitioner was convicted. Rather, he was convicted by his own words, by the words of co-defendant Balistrieri (whom the prosecution concededly could not be required to produce), by the photographs at

the hospital, and by his presence at discussions about the operation of the sports betting business. Accordingly, whatever the outcome of *Inadi*, petitioner's conviction should stand. The government's case would not have been "significantly less persuasive" without Ruggiero's statements, nor is there a "reasonable possibility that [Ruggiero's statements] contributed to the conviction." *Schneble* v. *Florida*, 405 U.S. at 432.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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Solicitor General

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